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Washington, DC**

BY FEDERAL EXPRESS

The Honorable John Paul Woodley, Jr.
Assistant Secretary of the Army, Civil Works
108 Army Pentagon, Room 3E446
Washington, D.C. 20310

**Re: Determination of Two Reaches of the Santa Cruz River as
Traditional Navigable Waters**

Dear Assistant Secretary Woodley:

On May 23, 2008, Colonel Thomas H. Magness, United States Army, acting as the Commander of the Los Angeles District of the Army Corps of Engineers ("the Corps"), issued a written determination that two reaches of the Santa Cruz River in southern Arizona are traditional navigable waters ("TNW") pursuant to 33 C.F.R. § 328.3. We understand that Corps Headquarters is reviewing that determination. The purpose of this letter is to provide you with comments regarding Colonel Magness' determination (hereinafter called the "TNW Determination") which, in our view, has no factual basis and is legally unsupportable.

1. Background on the Associations.

As a preliminary matter, the National Association of Home Builders ("NAHB") is a national trade association consisting of more than 235,000 builder and associate members organized into approximately 850 affiliated state and local associations in all 50 states, the District of Columbia and Puerto Rico. NAHB's members include individual and firms that construct single-family homes, apartments, condominiums, and commercial and industrial projects, as well as land developers and remodelers. NAHB has been closely involved in a number of Clean Water Act regulatory issues, including issues arising under the Section 404 permit program administered by the Corps.

The Home Builders Association of Central Arizona ("HBACA") and the Southern Arizona Home Builders Association ("SAHBA") are affiliates of NAHB. HBACA was formed in 1951 to provide a unified voice on issues affecting the housing and building industry in central Arizona, including Maricopa and Pinal Counties, and currently has approximately 850 members. SAHBA was similarly formed in 1953 to provide a vehicle for businesses in the housing and building trades industries in southern Arizona (including Pima County) to address issues relating to those industries. SAHBA presently has approximately 700 members.

Hon. John P. Woodley, Jr.
July 25, 2008
Page 2

All three Associations represent their members in legal, regulatory and legislative matters affecting the use and development of their land, including matters arising under the Clean Water Act. For the reasons set forth below, we are very concerned about the basis for the TNW determination, and the precedent that this determination may establish in the arid Southwest, given the historic and current condition of the Santa Cruz River.

2. The TNW Determination.

As previously stated, Colonel Magness has determined that two reaches of the Santa Cruz River, which is located in southern Arizona, are TNWs. One reach determined to be navigable is called "Study Reach A" and begins at the U.S. Geological Survey ("USGS") gage station near Tubac, Arizona, and ends at the USGS gauge station near Continental, Arizona, a distance of approximately 20 miles. By most historical accounts, the Santa Cruz River was ephemeral or intermittent in this area with very limited and irregular surface flows. The Arizona Department of Environmental Quality ("ADEQ") has classified Study Reach A as an ephemeral water for water quality and related purposes. A.A.C. R18-11-101(27) & App. B. At present, base flow in the lower portion of Study Reach A is regulated by the discharge of sewage effluent from the Nogales International Wastewater Treatment Plant, while the upper portion of this reach is dry most of the year.

The other reach determined to be navigable is called "Study Reach B" and begins at the outfall of Pima County's Roger Road wastewater treatment plant in northwestern Tucson, Arizona, and ends at the Pima County-Pinal County border, a distance of approximately 30 miles. Historically, this reach was ephemeral and presently has no natural flow for most of the year. Its base flow is sewage effluent that is discharged from Pima County wastewater treatment plants in northwest Tucson. ADEQ has classified Study Reach B as an "effluent-dependant water" for water quality and related purposes. A.A.C. R18-11-113(D)(7).

3. The Legal Test for Navigability.

As an initial matter, the Associations want to make clear our position that the jurisdiction of the Clean Water Act ("CWA") covers more than just TNWs. In *Rapanos v. United States*, 547 U.S. 715 (2006), both Justice Scalia (writing for the four-Justice plurality) and Justice Kennedy (concurring in the judgment) agreed that the CWA's scope extends beyond TNWs. See *id.* at 731 (Justice Scalia: "[T]he Act's term 'navigable waters' includes something more than traditional navigable waters"); *id.* at 779 (Justice Kennedy: "...[T]he Act contemplates regulation of certain 'navigable waters' that are not in fact navigable"). However, the determination of whether an aquatic feature is a TNW is the crucial, foundational component of each of their CWA analyses. Justice Scalia wrote that one "finding" necessary to determine if a wetland is covered by the CWA is if the "adjacent channel contains a 'water[r] of the United States,' (i.e., a relatively permanent body of water connected to *traditional interstate navigable waters*)" *Id.* at 742 (emphasis added). Justice Kennedy stated that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in

Hon. John P. Woodley, Jr.
 July 25, 2008
 Page 3

question and *navigable waters in the traditional sense.*" *Id.* at 779 (emphasis added) (Kennedy, J., concurring). Thus, while the CWA's purview is not coterminous with TNWs, waters deemed navigable in the traditional sense remain critical to determine the reach of Corps and EPA authority.

The determination of what Arizona rivers qualify as TNWs should be a simple, straightforward inquiry of what has been previously regulated by the Corps under the Rivers and Harbors Act ("RHA"), 33 U.S.C. §§ 403, 407. The Colorado River is the only water body in Arizona that qualifies.¹ Previously, the Corps concluded that the Gila River was non-navigable from Painted Rock dam to the Colorado River. If that reach of the Gila River is not navigable, then federal regulatory authority under the RHA could not extend to upstream reaches of the Gila River or any of its tributaries since RHA jurisdiction requires a continuous water-borne connection.² Therefore, the Colorado River represents the only watercourse "traditionally" regulated in Arizona.

The Corps' regulatory definition of the term "waters of the United States," found in 33 C.F.R. Part 328, does not alter the scope of federal jurisdiction. The test for traditional federal regulatory authority over "navigable waters of the United States" was set forth in *The Daniel Ball*, 77 U.S. 557, 563 (1870), which explained:

The test by which to determine the navigability of our rivers is found in their navigable capacity. Those rivers are public navigable rivers in law which are navigable in fact. Rivers are navigable in fact when they are used, or susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

Under this test, a water body must be used, or susceptible of being used, as a highway for commerce and, either by itself or in conjunction with other waters, form a continuous interstate highway for water-borne commerce.

¹ *Arizona v. California*, 283 U.S. 423 (1931). Notably, the Colorado River is the only Arizona watercourse listed on the Los Angeles District website as regulated under the RHA.

² See e.g., *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 621-22 (8th Cir. 1979).

Hon. John P. Woodley, Jr.
July 25, 2008
Page 4

The Corps' regulatory definition of "waters of the United States" incorporates *The Daniel Ball* test. So-called "(a)(1)" waters purport to consist of waters that were traditionally regulated based on their ability to form a continuous interstate highway for water-borne commerce. See 33 C.F.R. § 328.3(a)(1) (referring to "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide"). The Supreme Court's recent opinions in *Rapanos* similarly refer to "traditional interstate navigable waters" and to "waters susceptible to use in interstate commerce – the traditional understanding of the term 'navigable waters of the United States.'" *Rapanos v. United States*, 126 S.Ct. 2208, 2216 (citing 33 C.F.R. § 328(a)(1)) (plurality opinion), 2237 (Kennedy, J., concurring) (emphasis supplied). See also *Sierra Pacific Power Co. v. F.E.R.C.*, 681 F.2d 1134, 1138-40 (9th Cir. 1982) (holding that the Truckee River is not a navigable water of the United States because it lacks a navigable interstate linkage by water); *Puget Sound Power & Light Co. v. F.E.R.C.*, 644 F.2d 785, 789 (9th Cir. 1981) ("Navigability depends upon the stream's usefulness as a transportation mechanism for commerce").

In short, for a water body to be classified as a TNW, the water body must have been used, or be susceptible to use as a highway for water-borne interstate commerce, as opposed to being capable of floating a small boat immediately after a flood event or during peak discharges of sewage effluent.

4. The Historical Evidence and Finding of Non-Navigability Made By the Arizona Navigable Stream Commission.

Colonel Magness has apparently ignored the findings and determination that were made in 2006 by the Arizona Navigable Stream Adjudication Commission ("the Commission"), which was established by A.R.S. § 37-1101, *et seq.*, for the purpose of investigating and determining whether rivers, streams and other water bodies in Arizona were navigable for title purposes as of February 14, 1912. The Commission conducted hearings, received evidence and ultimately determined "that the Santa Cruz River was not used or susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water as of February 14, 1912." Arizona Navigable Stream Adjudication Commission, *Report, Findings And Determination Regarding The Navigability Of The Santa Cruz River From The Mexican Border To The Confluence With The Gila River* 27 (Oct. 18, 2006) ("Navigability Determination").³ In addition, the Commission also determined:

- "[T]he Santa Cruz River, while considered to be a perennial stream, has an almost insignificant flow during the dry seasons of the year. As of February 14, 1912 and currently, it flows/flowed primarily in direct response to precipitation and seasonal storms."

³ A copy of the Commission's Navigability Determination is enclosed with this letter.

Hon. John P. Woodley, Jr.
July 25, 2008
Page 5

- "[T]here is no evidence of any historical or modern commercial boating having occurred on the Santa Cruz River."
- "[T]here is no evidence of any commercial fishing having occurred on the Santa Cruz River."

Id. at 28. The Navigability Determination discusses a considerable amount of evidence, including written documents, studies, newspapers and other historical accounts, concerning pre-historic, historic and current conditions in the Santa Cruz River valley in support of its findings and determinations, which will not be repeated in this letter. *Id.* at 17-26. The Commission summarized this evidence as follows:

Although the Santa Cruz River has never within history or known prehistory been considered a navigable river, additional requirements for water from mining activities, agriculture and general requirements due to increased population diminished the amount of water available in the riverbed by a significant amount by 1912. As of the date of statehood, while there was some flow in the upper reaches of the Santa Cruz River, *i.e.*, in Santa Cruz County, the remainder of the river would have to be considered ephemeral or intermittent at best. The lower reach of the river from Marana north to the confluence with the Gila River has always been dry, flowing only in response to significant precipitation. The Santa Cruz valley has served as an overland trade route from prehistoric times, but there is no documented record of any trade or travel on the river during the period leading up to statehood. Travel in or near the Santa Cruz River was accomplished by horseback, wagon, pack mule, trains and later automobiles as the road system improved.

Id. at 25.

Other historians and commentators have provided similar descriptions of the Santa Cruz River. For example, in a recent study of major river systems in the southwestern United States, which was sponsored in part by the USGS, the authors summarized the Santa Cruz River as follows:

[T]he Santa Cruz was a discontinuous ephemeral stream in the 1800s with effluent-influent reaches that supported dense woody vegetation. With the exception of periods of flooding, there is no evidence that the Santa Cruz River had continuous flow from its headwaters to its terminus at the Gila River. Instead, local reaches of perennial flow punctuated an otherwise ephemeral stream.

Hon. John P. Woodley, Jr.
July 25, 2008
Page 6

Robert H. Webb, Stanley A. Leake and Raymond M. Turner, *The Ribbon of Green: Change in Riparian Vegetation in the Southwestern United States* 254 (Univ. of Arizona 2007).

An historian who has served as an expert witness for the Arizona Attorney General's Office and the City of Tucson on water-related issues has stated, in a report prepared on the upper Santa Cruz River (which includes Study Reach A):

Virtually no evidence exists to suggest the river was at any time navigable. Indeed, the river's most recent biographer, Michael Logan, entitled his eloquent and scholarly volume published in 2002, *The Lessening Stream: An Environmental History Of The Santa Cruz River*. It never mentions navigation. This persuasive interdisciplinary synthesis, supported by sound primary research, skillfully weaves history with geology, archaeology, and anthropology and concludes that the history of the upper Santa Cruz River centered on irrigation and agriculture, not navigation or commerce. Similarly, Tellman and Yarde dutifully attempt to report navigation possibilities in their account. However, compelling primary source information that suggests the Santa Cruz River as a navigable stream does not exist. Put another way, the long and tempestuous history of conflicts over a chronically intermittent stream and the high premium given to its irrigation capabilities – the great demands placed on the documented limits of the surface water – further indicates that navigational use was highly unlikely. The preponderance of scientific evidence ... attests to the fact that surface flows at [the time of statehood] were virtually non-existent. The waters of the Santa Cruz River fueled the basin's economy but they were not used for their navigability and transportation value. Instead, this "lessening stream's" intermittent supply served agricultural and domestic needs.

Jack L. August, Jr., *The Upper Santa Cruz River: History Of A Lessening Stream* 14-15 (March 2003) (citing Michael F. Logan, *The Lessening Stream: An Environmental History Of The Santa Cruz River* (University of Arizona Press 2002), and Barbara Tellman and Richard Yarde, *A Historical Study Of The Santa Cruz River: Background Information For Determination of Navigability Of The River At The Time Of Statehood, 1912* (Water Resources Research Center, University of Arizona 1996)).

Colonel Magness, unfortunately, ignored these publications and reports, as well as the Commission's Navigability Determination, and instead provided facts that are incorrect, misleading or simply irrelevant to determining whether the two study reaches have been used, or may be susceptible to use, as highways of interstate commerce.

Hon. John P. Woodley, Jr.
July 25, 2008
Page 7

For example, Colonel Magness notes that earthen dams were constructed on the river in the mid-1800s. TNW Determination at 1-2. The small lakes formed by these dams were used for milling, hunting waterfowl, aquaculture and other purposes until the 1880s. *Id.* First, the location of these improvements is *not* within either study reach. Instead, they were near present-day Silverlake Road, which is in South Tucson. Study Reach A ends about 30 miles south of this location, while Study Reach B begins about 8 miles north of this location.

Second, the reach of the Santa Cruz River from Martinez Hill, located west of the Tucson International Airport, to Sentinel Peak, near present-day Congress Street, was apparently perennial until the early twentieth century, at which time the City of Tucson's development of infiltration galleries and shallow wells for municipal water supplies dried up that reach of the river. See Webb, *supra*, at 258-59. A photo of the Santa Cruz River in this area is attached to the TNW Determination as Exhibit B.⁴ As the picture shows, however, this area was covered with grasses and mesquite groves, and was described as "swampy." *Id.* at 255.

Third, the reference to the river being "wide and deep enough to float a 'mammoth steamboat' (TNW Determination at 2) appears to refer to exaggerations made by a real estate speculator in the late 1800s:

Back at the end of the nineteenth century, an enterprising land speculator promoted sales of property at Calabasas (now Rio Rico, north of Nogales) with brochures showing ocean-going steamships moored at a busy Santa Cruz River wharf. ... The story persisted for years that steamships had plied the river. Anyone who came to see the busy wharf was destined to be disappointed in the shallow marshy creek, unable to support even small boats except in flood season.

Barbara Tellman, Richard Yarde and Mary G. Wells, *Arizona's Changing Rivers: How People Have Affected the Rivers* 3 (Water Resources Center, Univ. of Ariz. March 1997).

The reality is that, as the foregoing authorities demonstrate, Colonel Magness' statement that "[u]ntil the late nineteenth century, the Santa Cruz River was primarily a perennial watercourse that served the region's agricultural needs until a quickly developing industrial society began to tap the river subsurface flow" (TNW Determination at 1), is simply not accurate. In fact, much of the river was historically ephemeral or, at best, intermittent, including the two study reaches the Corps has declared to be TNWs. There is no evidence that either study

⁴ The same photo is also reproduced in Webb, at page 268, which describes the photo as showing a downstream view of the river in 1904, looking northeast from the slope of Sentinel Peak. It is surprising that the only historic photo appended to the TNW Determination is not from either study reach, but instead shows another portion of the river. At a minimum, this fact should have been clearly noted to avoid confusion.

Hon. John P. Woodley, Jr.
July 25, 2008
Page 8

reach was used, or was susceptible to being used, for any form of interstate water-borne commerce, as the Commission determined in 2006.

5. The Corps' TNW Determination Is Unsupported By Any Legitimate Evidence.

a. The Ordinary Condition of the Santa Cruz River.

Colonel Magness contends that the two study reaches possess "physical characteristics" indicating that they have the capacity and susceptibility to be navigated by recreational water craft. TNW Determination at 2. As a preliminary matter, a water body's susceptibility to use for recreational purposes is insufficient by itself to support a finding that the water body is a TNW, i.e., susceptible to being used as a highway for interstate commerce. See, e.g., *Alaska v. Ahta, Inc.*, 891 F.2d 1401, 1404-05 (9th Cir. 1989) (holding that evidence of substantial commercial use by recreational watercraft industry that employs some 400 persons supported finding of river's navigability at statehood). *Puget Sound Power*, 644 F.2d at 788 ("The 'personal or private use by boats' may demonstrate 'the availability of the stream for the simpler types of commercial navigation.'" (quoting *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 416 (1940))). Putting aside that legal error, the discussion that follows on pages 2 through 4 of the TNW Determination is incomplete and misleading.

Colonel Magness reviewed flow data published by the USGS for stream gages located near Tubac, Amado and Continental evaluating the Study Reach A, and gages near Cortaro Road and Trico Road in evaluating Study Reach B. Colonel Magness discussed the *mean* and *average* flow rates at these gage stations. The problem with this approach is that it fails to properly take into account flood flows that result from localized storm events, which do not represent the ordinary or normal base flow in the river. As the Supreme Court has explained:

In the case of the Rio Grande in New Mexico, the Court said ... :
"Its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water. The ordinary flow of water is insufficient. It is not like the Fox River, which was considered in *The Montello*, in which was an abundant flow of water and a general capacity for navigation along its entire length, and although it was obstructed at certain places by rapids and rocks, yet these difficulties could be overcome by canals and locks, and when so overcome would leave the stream, in its ordinary condition, susceptible of use for general navigational purposes." ... [T]he Court, describing the Red River in the western part of Oklahoma, said that "Only for short intervals, when the rain-fall is running off, are the volume and depth of the water such that even very small boats could be operated therein. ... The rises usually last from one to seven days and in the aggregate seldom cover as much as forty days in the year," and, in relation to

Hon. John P. Woodley, Jr.

July 25, 2008

Page 9

the eastern part of the river, it was found ... that "Its characteristics are such that its use for transportation has been and must be exceptional, and confined the irregular and short periods of temporary high water." In [a third case] the Court accepted the findings of the two courts below as to the non-navigability of the Arkansas River above the mouth of the Grand River in Oklahoma, and the District Court, to whose findings the Circuit Court of Appeals referred, had said that "The use of that portion of the river for transportation boats has been exceptional and necessarily on high water, was found impractical and abandoned. The rafting of logs or freight has been attended with difficulties precluding utility. There is no practical susceptibility to use as a highway of trade or travel."

United States v. Utah, 283 U.S. 64, 87-88, n.12 (1931) (quoting *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699 (1899); *Oklahoma v. Texas*, 258 U.S. 574, 587 (1922); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922). (citations omitted)⁵ See also *North Dakota v. United States*, 972 F.2d 235, 239 (8th Cir. 1992) (an isolated commercial venture that is partially successful because of unusually high water is not evidence of navigability); *Puget Sound Power*, 644 F.2d at 787 ("If the waterway is merely capable of exceptional transportation during periods of high water, it is not navigable.").

Here, it is apparent from the face of the TNW Determination that the Santa Cruz River's normal flow is substantially less than the peak flow. For example, while the mean monthly discharge at the Continental gage station since 1940 has varied from 0.43 cfs to 76 cfs, the maximum peak flow at that same station was approximately 45,000 cfs in the early 1980s, and the minimum peak flow has exceeded 1,000 cfs 63 times (approximately once each year) since 1940. TNW Determination at 3. The data presented in the TNW Determination show a similar pattern for the other gage stations. In order to determine the ordinary or normal flow rate, therefore, Colonel Magness should have eliminated peak (i.e., flood) flows by, for example, calculating the mean or average flow rate without considering the 25 highest daily mean flows to exclude periods of temporary flooding.

Instead, peak flows apparently are discussed in the TNW Determination to show that for a few weeks each year (or less) the Santa Cruz actually carries more than a few cubic feet per second of water. Compare, e.g., *Athna*, 891 F.2d at 1402 (stating that the normal flow in the river at issue varies from 3,600 to 4,800 cfs from May through September). The issue, again, is

⁵ In *United States v. Utah*, by contrast, the special master had determined that portions of the Colorado River specifically determined that the river's "susceptibility of use as a highway for commerce was not confined to exceptional conditions or for short periods of temporary high water, but that during at least nine months of each year the river ordinarily was susceptible of such use" *Id.* at 87.

Hon. John P. Woodley, Jr.
July 25, 2008
Page 10

the "ordinary condition" of the Santa Cruz River, not its peak flows during flood events, as the courts have repeatedly stated.

Even more troubling is the failure of Colonel Magness to acknowledge the role that sewage effluent plays in maintaining minimum flows in both study reaches. The base flow in Study Reach A is regulated by the Nogales International Wastewater Treatment Plant ("NIWTP"), which is located near Rio Rico, Arizona, approximately 10 miles south (upstream) of the Tubac gage station. The NIWTP discharges between 8.8 mgd and 16.0 mgd of sewage effluent into the Santa Cruz River every month. According to the Environmental Protection Agency "[t]he volume of effluent discharged from the NIWTP is directly but not completely correlated with the length of the above ground portions of the Santa Cruz River. This length, depending on season and year, currently averages about 26 km (16 miles)." *Environmental Assessment for Nogales International Wastewater Treatment Plant (NIWTP) Upgrade/Expansion*, 1-36 (Region IX, U.S.E.P.A.).⁶ See also *id.* at 1-17 ("it is clear, however, that during the vast majority of the time, the primary contributor to surface flow downstream of the NIWTP is the volume of effluent discharged to the Santa Cruz River"). Similarly, the USGS has stated that base flow at the Tubac gage station "is regulated by [the] sewage treatment plant at Rio Rico. *No natural flow for most of each year.*" USGS, *Water Resources Data Arizona: Water Year 1999, Water-Data Report AZ-99-1*, 179 (2000) (emphasis supplied).

Study Reach B is likewise dominated by sewage effluent. Pima County operates and maintains two metropolitan area wastewater treatment facilities, which are located near the Santa Cruz River at Roger Road and Ina Road. In fact, the southern (upstream) limit of Study Reach B is the Roger Road sewer plant's outfall. TNW Determination at 1. The combined treatment capacity of those facilities is 78.5 mgd, and they collectively discharged over 52,000 acre-feet of effluent directly into the river in 2007. Pima County Regional Wastewater Reclamation Department, *2007 Effluent Generation Report* 3.⁷ As a consequence, virtually all of the flows recorded in Study Reach B are the result of the discharge of sewage effluent into the river. For example, the USGS has stated that most of the base flow at the Trico Road gage station, located in the northern (downstream) portion of Study Reach B, consists of effluent discharged from the Ina Road sewer plant, which is located 17.6 miles upstream. USGS, *Water Resources Data* at 191.

Remarkably, the TNW Determination fails to squarely address the fact that the "ordinary" flow in both study reaches consists primarily (if not completely) of sewage effluent. Instead, the TNW Determination cryptically notes, for example, that ADEQ "has adopted water

⁶ This environmental assessment and other background information on the NIWTP's operations are available at <http://www.epa.gov/usmexicoborder/infrastructure/nogales/waste.html> (last visited July 23, 2008).

⁷ This report is available at http://www.pima.gov/wwm/reports/index_reports.htm#effluent (last visited July 23, 2008).

Hon. John P. Woodley, Jr.
July 25, 2008
Page 11

quality standards for the Santa Cruz River for partial body contact." TNW Determination at 4. Full body contact is, for obvious reasons, not permitted, nor can this water be used to irrigate crops for human consumption.⁸

Colonel Magness disregarded both flood flows and effluent discharges to conclude that data from the Tubac, Cortaro and Trico Road gage stations indicate that "during most days" from July to October and during approximately half of the months of December and January, "there is sufficient flow in the Santa Cruz River within the Study reaches to float a canoe." TNW Determination at 4. As explained above, to the extent there is water within the study reaches during those periods, it is the result of a combination of flood flows caused by precipitation events and the discharge of sewage effluent. Neither condition represents the ordinary or normal condition of the river.

b. Two "Boating" Stunts Do Not Establish Navigability.

The concluding pages of the TNW Determination contain a hodgepodge of irrelevant information, including references to two instances where the Santa Cruz River was allegedly "navigated." TNW Determination at 5. These activities consisted of two largely unsuccessful attempts to float a small boat on the river immediately following a flood event. *Id.* at Exhibit G ("additional navigation documentation"). According to this documentation, in August 2005, a Tucson radio station intern launched a raft "in the flooded Santa Cruz River," but managed to get out of the river before he was located by police officers. A Tucson fire department official stated that this stunt was irresponsible and unsafe. This news story highlights that during flood events, the Santa Cruz River is not susceptible to navigation but is, instead, a safety risk.

The other documentation is a news story that was published in October 1994, describing an event that apparently occurred in 1993 "after the January floods." *Id.*⁹ This news article, which is written in a humorous style, highlights the difficulty of boating on the Santa Cruz River, even after a significant flood event. It appears that the would-be boaters began approximately one mile south of Tubac, had their canoe immediately capsize when it slammed against a tree, but were ultimately able to travel about three miles of the river and into a portion of Study Reach A. The article mentions another, earlier attempt to "navigate" the river following a flood event

⁸ ADEQ has classified the Santa Cruz River from the NIWTP outfall to Tubac Bridge and from the Roger Road wastewater treatment plant outfall to Baumgartner Road in southern Pinal County as "effluent-dependent waters." See A.A.C. R18-11-113(D)(7). ADEQ has also classified the reach of the Santa Cruz River from the Tubac Bridge north (downstream) to the Roger Road wastewater treatment plant outfall as ephemeral, which is defined as "a surface water that has a channel that is at all times above the water table, and that flows only in direct response to precipitation." A.A.C. R18-11-101(22) & App. B. Thus, ADEQ has classified all of Study Reach A as an ephemeral water.

⁹ Major flooding occurred in much of Arizona during January 1993, as evidenced by Exhibit D of the TNW Determination. According to that document, a peak flow of 37,400 cfs was recorded on January 19, 1993 at the USGS gage in Tucson.

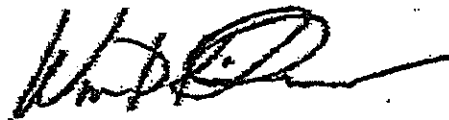
Hon. John P. Woodley, Jr.
July 25, 2008
Page 12

in 1914, noting that the boat failed to reach its intended destination in Tucson and was, instead, dragged out of the river and used as a watering trough for cattle.

These stunts, while amusing, do not support the TNW Determination. To the extent they are relevant, they highlight the fact that the Santa Cruz River is unsafe and cannot be navigated during periods of peak flow. The balance of the TNW Determination discusses a number of additional, unhelpful facts, such as the potential for tourists to visit the river and engage in activities such as hiking, horseback riding and birding. TNW Determination at 4, 5. Obviously, the possibility that out-of-state tourists may visit the area and hike along the river due to its easy access is irrelevant to the issue of whether the river is "susceptible of being used, in [its] ordinary condition, as [a] highway[] for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. at 563.

For these reasons, we believe that Colonel Magness' determination that Study Reaches A and B are navigable waters of the United States has no legal or factual basis. Accordingly, we ask that Corps headquarters vacate the TNW Determination. We also ask that Colonel Magness be instructed to apply the correct *Daniel Ball* test for determining whether other Arizona water bodies constitute a TNW. If you have any questions or require additional information, please contact at the National Association of Home Builders: Susan Asmus, Staff Vice President, Environmental Policy (sasmus@nahb.com, (800-368-5242 x8538); or Duane Desiderio, Staff Vice President, Legal Affairs (ddesiderio@nahb.com, (800) 368-5242 x8146).

Sincerely,



William P. Killmer
Group Executive Vice President, Advocacy
National Association of Home Builders



Connie
President and Executive Director
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Edward P. Taczanowski
President
Southern Arizona Home Builders Association

Hon. John P. Woodley, Jr.
July 25, 2008
Page 13

Enclosures: Report, Findings and Determination of Arizona Navigable Stream Adjudication
Commission, Regarding Santa Cruz River, October 18, 2006

c: Colonel Thomas H. Magness, Commander, Corps Los Angeles District (by Federal Express)

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**Office of the ASA (CW)
Washington, DC**

**BEFORE THE
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION**

**IN THE MATTER OF THE
NAVIGABILITY OF THE SANTA CRUZ
RIVER FROM THE MEXICAN BORDER
TO THE CONFLUENCE WITH THE
GILA RIVER; SANTA CRUZ, PIMA
AND PINAL COUNTIES, ARIZONA**

No.: 03-002-NAV

**REPORT, FINDINGS AND DETERMINATION
REGARDING THE NAVIGABILITY OF THE
SANTA CRUZ RIVER FROM THE MEXICAN BORDER
TO THE CONFLUENCE WITH THE GILA RIVER**

BEFORE THE
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

IN THE MATTER OF THE
NAVIGABILITY OF THE SANTA CRUZ
RIVER FROM THE MEXICAN BORDER
TO THE CONFLUENCE WITH THE
GILA RIVER; SANTA CRUZ, PIMA
AND PINAL COUNTIES, ARIZONA

No.: 03-002-NAV

**REPORT, FINDINGS AND DETERMINATION
REGARDING THE NAVIGABILITY OF THE
SANTA CRUZ RIVER FROM THE MEXICAN BORDER
TO THE CONFLUENCE WITH THE GILA RIVER**

Pursuant to Title 37, Chapter 7, Arizona Revised Statutes, the Arizona Navigable Stream Adjudication Commission ("Commission") has undertaken to receive, compile, review and consider relevant historical and scientific data and information, documents and other evidence regarding the issue of whether the Santa Cruz River from the Mexican border to the confluence with the Gila River was navigable or nonnavigable for title purposes as of February 14, 1912. Proper and legal public notice was given in accordance with law and a hearing was held at which all parties were afforded the opportunity to present evidence, as well as their views, on this issue. The Commission having considered all of the historical and scientific data and information, documents and other evidence, including the oral and written presentations made by persons appearing at the public hearing and being fully advised in the premises, hereby submits its report, findings and determination.

I. PROCEDURE

On December 24, 2002, in accordance with A.R.S. § 37-1123B, the Commission gave proper prior notice of its intent to study the issue of navigability or nonnavigability of the Santa Cruz River from the Mexican border to the confluence with the Gila River. A copy of the Notice of Intent to Study and Receive, Review and Consider Evidence on the issue of navigability of the Santa Cruz River in Santa Cruz, Pima and Pinal Counties, Arizona, is attached hereto as Exhibit "A."

After collecting and documenting all reasonably available evidence received pursuant to the Notice of Intent to Study and Receive, Review and Consider Evidence, the Commission scheduled public hearings to receive additional evidence and testimony regarding the navigability or nonnavigability of the Santa Cruz River. Public notices of these hearings was given by legal advertising on September 5, 2003 as required by law pursuant to A.R.S. § 37-1126 and, in addition, by mail to all those requesting individual notice and by means of the ANSAC website (azstreambeds.com). Hearings were held on March 11, 2003 in the City of Nogales, the county seat of Santa Cruz County, on January 22, 2004 in the City of Tucson, the county seat of Pima County, and on March 9, 2004 in the City of Florence, the county seat of Pinal County, since the law requires that such hearings be held in the county in which the watercourse being studied is located. Attached hereto as Exhibit "B" are copies of the notices of the public hearings.

All parties were advised that anyone who desired to appear and give testimony at the public hearing could do so and, in making its findings and determination as to navigability and nonnavigability, the Commission would consider all matters presented to it at the hearing, as well as other historical and scientific data, information, documents and evidence that had been submitted to the Commission at any time prior to the date of the hearing, including all data, information, documents and evidence previously submitted to the Commission. Following the public hearings held on

March 11, 2003, January 22, 2004 and March 9, 2004, all parties were advised that they could file post-hearing memoranda pursuant to the Commission's Rules. Post-hearing memoranda were filed by the Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users Association, Phelps Dodge Corporation, the Defenders of Wildlife, and the Arizona Center for Law in the Public Interest.

On September 16, 2004, at a public hearing in Phoenix, Arizona, after considering all of the evidence and testimony submitted and the post-hearing memoranda filed with the Commission, and the comments and oral argument presented by the parties, and being fully advised in the premises, the Commission, with a unanimous vote, found and determined in accordance with A.R.S. § 37-1128 that the Santa Cruz River from the Mexican border to the confluence with the Gila River in Santa Cruz, Pima and Pinal Counties, Arizona, was nonnavigable as of February 14, 1912.

II. THE SANTA CRUZ RIVER FROM THE MEXICAN BORDER TO THE CONFLUENCE WITH THE GILA RIVER

The Santa Cruz River has its headwaters at the southern base of the Canalo Hills in Santa Cruz County, Arizona, and flows generally south as a shallow perennial stream through the San Rafael valley before crossing into Mexico near the town of Loquiel. The river describes a loop of about 30 miles with a 348-square mile contributing drainage area in Mexico before reentering the United States approximately six miles east of Nogales, approximately in the center of the southern edge of Section 16, Township 24 South, Range 14 East of the Gila and Salt River Base and Meridian, approximately at Latitude 31° 20' North and Longitude 110° 55' West. The small portion of the Santa Cruz River in Santa Cruz County before entering Mexico is considered a small or minor watercourse and is not treated in this report. Likewise, neither is the area in which the river flows through northern Mexico.

The river channel continues northward from the international boundary with Mexico past Rio Rico, Tumacacori National Monument, Tubac, Green Valley, San

Xavier del Bac, and Tucson, and then in a northwesterly direction past the town of Marana, south of Eloy and Casa Grande near the Indian village of Chui Chu in Pima County, and then flows into Pinal County past the settlement of Maricopa where it flows into the Gila River a few miles south of the confluence of the Gila and Salt River, approximately in the center of the north half of Section 17, Township 2 South, Range 2 East of the Gila and Salt River Base and Meridian approximately Latitude $33^{\circ} 15.75'$ North and Longitude $112^{\circ} 10.75'$ West. The reach of the river considered in this report is a total distance of about 225 miles.

The entire Santa Cruz River basin encompasses approximately 8,581 square miles. The elevation at the point the Santa Cruz River crosses the international boundary near Nogales is approximately 3,875 feet above sea level and the elevation at the Santa Cruz River confluence with the Gila River is approximately 940 feet above sea level.

The major tributaries of the Santa Cruz River from south to north are Nogales Wash, Sonoita Creek, Rillito Creek, Canada del Oro Wash and the Altar-Brawley Wash. The Santa Cruz River watershed can be broken into two reaches based on environmental, geomorphic and hydrologic characteristics, but was studied as one entire watercourse by the Commission. A map of the Santa Cruz River watershed is attached hereto as Exhibit "C."

A. The Upper Santa Cruz River Valley

The upper Santa Cruz River encompasses the reach from the Mexican border near Nogales to Marana, Arizona. In the upper portion of this reach, the river is perennial, but is dry most of the year north of the Pima County line. The channel lies within an inner valley created within broad dissected pediments and alluvial base and deposits flanked by mountains. The well-defined entrenched channel in the upper reach is considered arroyo in nature. It is a semi-desert grassland with mesquite and

many perennial grasses. There are also riparian areas fed with low flowing perennial streams and springs.

B. The Lower Santa Cruz River

The lower Santa Cruz River valley reach extends from Marana to the Santa Cruz River's confluence with the Gila River. Below Marana the river is clearly ephemeral and flows only when there is significant precipitation. It flows into the "Santa Cruz Flats" which is a broad plain of indistinct non-continuous channels. In this area floodwaters spread over a wide area with flow concentrated in various small washes. Distinct channels exist only along the former alignment of a canal and near the Santa Cruz River's confluence with the Gila River. The vegetation is typical Sonoran Desert, with creosote bush, salt bush, ironwood, ocotillo, saguaro and cholla.

III. BACKGROUND AND HISTORICAL PERSPECTIVES

A. Public Trust Doctrine and Equal Footing Doctrine

The reason for the legislative mandated study of navigability of watercourses within the state is to determine who holds title to the beds and banks of such rivers and watercourses. Under the Public Trust Doctrine, as developed by common law over many years, the tidal lands and beds of navigable rivers and watercourses, as well as the banks up to the high water mark, are held by the sovereign in a special title for the benefit of all the people. In quoting the U. S. Supreme Court, the Arizona Court of Appeals described the Public Trust Doctrine in its decision in *The Center for Law v. Hassell*, 172 Arizona 356, 837 P.2d 158 (App. 1991), *review denied* (October 6, 1992).

An ancient doctrine of common law restricts the sovereign's ability to dispose of resources held in public trust. This doctrine, integral to watercourse sovereignty, was explained by the Supreme Court in *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892). A state's title to lands under navigable waters is a title different in character from that which the State holds in lands intended for sale. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over

them, and have liberty of fishing therein freed from the obstruction or interference of private parties.

Id. at 452, 13 S.Ct. at 118; see also *Martin v. Waddell*, 41 U.S. (16 Pet.) at 413 (describing watercourse sovereignty as "a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shellfish as floating fish").

Id., 172 Ariz. at 364, 837 P.2d at 166.

This doctrine is quite ancient and was first formally codified in the Code of the Roman Emperor Justinian between 529 and 534 A.D.¹ The provisions of this Code, however, were based, often verbatim, upon much earlier institutes and journals of Roman and Greek law. Some historians believe that the doctrine has even earlier progenitors in the rules of travel on rivers and waterways in ancient Egypt and Mesopotamia. This rule evolved through common law in England which established that the king as sovereign owned the beds of commercially navigable waterways in order to protect their accessibility for commerce, fishing and navigation for his subjects. In England the beds of non-navigable waterways where transportation for commerce was not an issue were owned by the adjacent landowners.

This principle was well established by English common law long before the American Revolution and was a part of the law of the American colonies at the time of the Revolution. Following the American Revolution, the rights, duties and responsibilities of the crown passed to the thirteen new independent states, thus making them the owners of the beds of commercially navigable streams, lakes and other waterways within their boundaries by virtue of their newly established sovereignty. The ownership of trust lands by the thirteen original states was never ceded to the federal government. However, in exchange for the national government's agreeing to pay the debts of the thirteen original states incurred in financing the Revolutionary War, the states ceded to the national government their undeveloped

¹ Putting the Public Trust Doctrine to Work, David C. Slade, Esq. (Nov. 1990), pp. xvii and 4.

western lands. In the Northwest Ordinance of 1787, adopted just prior to the ratification of the U.S. Constitution and subsequently re-enacted by Congress on August 7, 1789, it was provided that new states could be carved out of this western territory and allowed to join the Union and that they "shall be admitted . . . on an equal footing with the original states, in all respects whatsoever." (Ordinance of 1787: The Northwest Territorial Government, § 14, Art. V, 1 stat. 50. See also U. S. Constitution, Art. IV, Section 3). This has been interpreted by the courts to mean that on admission to the Union, the sovereign power of ownership of the beds of navigable streams passes from the federal government to the new state. *Pollard's Lessee v. Hagan, et al.*, 44 U.S. (3 How.) 212 (1845), and *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987).

In discussing the Equal Footing Doctrine as it applies to the State's claim to title of beds and banks of navigable streams, the Court of Appeals stated in *Hassell*:

The state's claims originated in a common-law doctrine, dating back at least as far as Magna Charta, vesting title in the sovereign to lands affected by the ebb and flow of tides. See *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 412-13, 10 L.Ed. 997 (1842). The sovereign did not hold these lands for private usage, but as a "high prerogative trust . . . , a public trust for the benefit of the whole community." *Id.* at 413. In the American Revolution, "when the people . . . took into their own hands the powers of sovereignty, the prerogatives and regalities which before belong either to the crown or the Parliament, became immediately and rightfully vested in the state." *Id.* at 416.

Although watercourse sovereignty ran with the tidewaters in England, an island country, in America the doctrine was extended to navigable inland watercourses as well. See *Barney v. Keokuk*, 94 U.S. 324, 24 L.Ed. 224 (1877); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 434, 13 S.Ct. 110, 111, 36 L.Ed. 1018 (1892). Moreover, by the "equal footing" doctrine, announced in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845), the Supreme Court attributed watercourse sovereignty to future, as well as then-existent, states. The Court reasoned that the United States government held lands under territorial navigable waters in trust for future states, which would accede to sovereignty on an "equal footing" with established states upon admission to the Union. *Id.* at 222-23, 229; accord *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); *Land*

Department v. O'Toole, 154 Ariz. 43, 44, 739 P.2d 1360, 1361 (App. 1987).

The Supreme Court has grounded the states' watercourse sovereignty in the Constitution, observing that "[t]he shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively." *Pollard's Lessee*, 44 U.S. (3 How.) at 230; see also *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374, 97 S.Ct. 582, 589, 50 L.Ed.2d 550 (1977) (states' "title to lands underlying navigable waters within [their] boundaries is conferred . . . by the [United States] constitution itself").

Id., 172 Ariz. 359-60, 837 P.2d at 161-162.

In the case of Arizona, the "equal footing" doctrine means that if any stream or watercourse within the State of Arizona was navigable on February 14, 1912, the date Arizona was admitted to the Union, the title to its bed is held by the State of Arizona in a special title under the public trust doctrine. If the stream was not navigable on that date, ownership of the streambed remained in such ownership as it was prior to statehood—the United States if federal land, or some private party if it had previously been patented or disposed of by the federal government—and could later be sold or disposed of in the manner of other land since it had not been in a special or trust title under the public trust doctrine. Thus, in order to determine title to the beds of rivers, streams, and other watercourses within the State of Arizona, it must be determined whether or not they were navigable or non-navigable as of the date of statehood.

B. Legal Precedent to Current State Statutes

Until 1985, most Arizona residents assumed that all rivers and watercourses in Arizona, except for the Colorado River, were non-navigable and accordingly there was no problem with the title to the beds and banks of any rivers, streams or other watercourses. However, in 1985 Arizona officials upset this long-standing assumption and took action to claim title to the bed of the Verde River. *Land Department v. O'Toole*, 154 Ariz. 43, 739 P.2d 1360 (App. 1987). Subsequently,

various State officials alleged that the State might hold title to certain lands in or near other watercourses as well. *Id.*, 154 Ariz. at 44, 739 P.2d at 1361. In order to resolve the title questions to the beds of Arizona rivers and streams, the Legislature enacted a law in 1987 substantially relinquishing the state's interest in any such lands.² With regard to the Gila, Verde and Salt Rivers, this statute provided that any record title holder of lands in or near the beds of those rivers could obtain a quitclaim deed from the State Land Commissioner for all of the interest the state might have in such lands by the payment of a quitclaim fee of \$25.00 per acre. The Arizona Center for Law in the Public Interest filed suit against Milo J. Hassell in his capacity as State Land Commissioner, claiming that the statute was unconstitutional under the public trust doctrine and gift clause of the Arizona Constitution as no determination had been made of what interest the state had in such lands and what was the reasonable value thereof so that it could be determined that the state was getting full value for the interests it was conveying. The Superior Court entered judgment in favor of the defendants and an appeal was taken. In its decision in *Hassell*, the Court of Appeals held that this statute violated the public trust doctrine and the Arizona Constitution and further set forth guidelines under which the state could set up a procedure for determining the navigability of rivers and watercourses in Arizona. In response to this decision, the Legislature established the Arizona Navigable Stream Adjudication Commission and enacted the statutes pertaining to its operation. 1992 Arizona Session Laws, Chapter 297 (1992 Act). The charge given to the Commission by the 1992 Act was to conduct full evidentiary public hearings across the state and to adjudicate the State's claims to ownership of lands in the beds of watercourses. *See generally* former A.R.S. §§ 37-1122 to -1128.

² Prior to the enactment of the 1987 statute, the Legislature made an attempt to pass such a law, but the same was vetoed by the Governor. The 1987 enactment was signed by the Governor and became law. 1987 Arizona Session Laws, Chapter 127.

The 1992 Act provided that the Commission would make findings of navigability or non-navigability for each watercourse. See former A.R.S. § 37-1128(A). Those findings were based upon the "federal test" of navigability in former A.R.S. § 37-1101(6). The Commission would examine the "public trust values" associated with a particular watercourse only if and when it determined that the watercourse was navigable. See former A.R.S. §§ 37-1123(A)(3), 37-1128(A).

The Commission began to take evidence on certain watercourses during the fall of 1993 and spring of 1994. In light of perceived difficulties with the 1992 Act, the Legislature revisited this issue during the 1994 session and amended the underlying legislation. See 1994 Arizona Session Laws, ch. 278 ("1994 Act"). Among other things, the 1994 Act provided that the Commission would make a recommendation to the Legislature, which would then hold additional hearings and make a final determination of navigability by passing a statute with respect to each watercourse. The 1994 Act also established certain presumptions of non-navigability and exclusions of some types of evidence.

Based upon the 1994 Act, the Commission went forth with its job of compiling evidence and making a determination of whether each watercourse in the state was navigable as of February 14, 1912. The Arizona State Land Department issued technical reports on each watercourse, and numerous private parties and public agencies submitted additional evidence in favor of or opposed to navigability for particular watercourses. See *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 416, 18 P.3d 722, 727 (App. 2001). The Commission reviewed the evidence and issued reports on each watercourse, which were transmitted to the Legislature. The Legislature then enacted legislation relating to the navigability of each specific watercourse. The Court of Appeals struck down that legislation in its *Hull* decision, finding that the Legislature had not applied the proper standards of navigability. *Id.* 199 Ariz. at 427-28, 18 P.2d at 738-39.

In 2001, the Legislature again amended the underlying statute in another attempt to comply with the court's pronouncements in *Hassell* and *Hull*. See 2001 Arizona Session Laws, ch. 166, § 1. The 2001 legislation now governs the Commission in making its findings with respect to rivers, streams and watercourses.

IV. ISSUES PRESENTED

The applicable Arizona statutes state that the Commission has jurisdiction to determine which, if any, Arizona watercourses were "navigable" on February 14, 1912 and for any watercourses determined to be navigable, to identify the public trust values. A.R.S. § 37-1123. A.R.S. § 37-1123A provides as follows:

A. The commission shall receive, review and consider all relevant historical and other evidence presented to the commission by the state land department and by other persons regarding the navigability or nonnavigability of watercourses in this state as of February 14, 1912, together with associated public trust values, except for evidence with respect to the Colorado river, and, after public hearings conducted pursuant to section 37-1126:

1. Based only on evidence of navigability or nonnavigability, determine what watercourses were not navigable as of February 14, 1912.

2. Based only on evidence of navigability or nonnavigability, determine whether watercourses were navigable as of February 14, 1912.

3. In a separate, subsequent proceeding pursuant to section 37-1128, subsection B, consider evidence of public trust values and then identify and make a public report of any public trust values that are now associated with the navigable watercourses.

A.R.S. §§ 37-1128A and B provide as follows:

A. After the commission completes the public hearing with respect to a watercourse, the commission shall again review all available evidence and render its determination as to whether the particular watercourse was navigable as of February 14, 1912. If the preponderance of the evidence establishes that the watercourse was navigable, the commission shall issue its determination confirming the watercourse was navigable. If the preponderance of the evidence fails to establish that the watercourse was

navigable, the commission shall issue its determination confirming that the watercourse was nonnavigable.

B. With respect to those watercourses that the commission determines were navigable, the commission shall, in a separate, subsequent proceeding, identify and make a public report of any public trust values associated with the navigable watercourse.

Thus, in compliance with the statutes, the Commission is required to collect evidence, hold hearings, and determine which watercourses in existence on February 14, 1912, were navigable or nonnavigable. This report pertains to the 225-mile reach of the Santa Cruz River from the point where it crosses the Mexico - Arizona international border, approximately 6 miles east of Nogales flowing north through Rio Rico, Tubac, Tucson, Marana, Casa Grande and Maricopa until it joins with and flows into the Gila River. In the hearings to which this report pertains, the Commission considered all of the available historical and scientific data and information, documents and other evidence relating to the issue of navigability of the Santa Cruz River in Santa Cruz, Pima and Pinal Counties, Arizona as of February 14, 1912.

Public Trust Values were not considered in these hearings but will be considered in separate, subsequent proceedings if required. A.R.S. §§ 37-1123A3 and 37-1128B. In discussing the use of an administrative body such as the Commission on issues of navigability and public trust values, the Arizona Court of Appeals in its decision in *Hassell* found that State must undertake a "particularized assessment" of its "public trust" claims but expressly recognized that such assessment need not take place in a "full blown judicial" proceeding.

We do not suggest that a full-blown judicial determination of historical navigability and present value must precede the relinquishment of any state claims to a particular parcel of riverbed land. An administrative process might reasonably permit the systematic investigation and evaluation of each of the state's claims. Under the present act, however, we cannot find that the gift clause requirement of equitable and reasonable consideration has been met.

Id., 172 Ariz. at 370, 837 P.2d at 172.

The 2001 *Hull* court, although finding certain defects in specific aspects of the statute then applicable, expressly recognized that a determination of "navigability" was essential to the State having any "public trust" ownership claims to lands in the bed of a particular watercourse:

The concept of navigability is "essentially intertwined" with public trust discussions and "[t]he navigability question often resolves whether any public trust interest exists in the resource at all." Tracy Dickman Zobenica, *The Public Trust Doctrine in Arizona's Streambeds*, 38 Ariz. L. Rev. 1053, 1058 (1996). In practical terms, this means that before a state has a recognized public trust interest in its watercourse bedlands, it first must be determined whether the land was acquired through the equal footing doctrine. However, for bedlands to pass to a state on equal footing grounds, the watercourse overlying the land must have been "navigable" on the day that the state entered the union.

199 Ariz. at 418, 18 P.3d at 729 (also citing *O'Toole*, 154 Ariz. at 45, 739 P.2d at 1362) (emphasis added).

The Legislature and the Court of Appeals in *Hull* have recognized that, unless the watercourse was "navigable" at statehood, the State has no "public trust" ownership claim to lands along that watercourse. Using the language of *Hassell*, if the watercourse was not "navigable," the "validity of the equal footing claims that [the State] relinquishes" is zero. *Hassell*, 172 Ariz. at 371, 837 P.2d at 173. Thus, if there is no claim to relinquish, there is no reason to waste public resources determining (1) the value of any lands the State might own if it had a claim to ownership, (2) "equitable and reasonable considerations" relating to claims it might relinquish without compromising the "public trust," or (3) any conditions the State might want to impose on transfers of its ownership interest. See *id.*

V. BURDEN OF PROOF

The Commission in making its findings and determinations utilized the standard of the preponderance of the evidence as the burden of proof as to whether or not a stream was navigable or nonnavigable. A.R.S. § 37-1128A provides as follows:

After the commission completes the public hearing with respect to a watercourse, the commission shall again review all available evidence and render its determination as to whether the particular watercourse was navigable as of February 14, 1912. If the preponderance of the evidence establishes that the watercourse was navigable, the commission shall issue its determination confirming that the watercourse was navigable. If the preponderance of the evidence fails to establish that the watercourse was navigable, the commission shall issue its determination confirming that the watercourse was nonnavigable.

This statute is consistent with the decision of the Arizona courts that have considered the matter. *Hull*, 199 Ariz. at 420, 18 P.3d at 731 ("... a 'preponderance' of the evidence appears to be the standard used by the courts. See, e.g., *North Dakota v. United States*, 972 F.2d 235-38 (8th Cir. 1992)"); *Hassell*, 172 Ariz. at 363, n. 10, 837 P.2d at 165, n. 10 (The question of whether a watercourse is navigable is one of fact. The burden of proof rests on the party asserting navigability...); *O'Toole*, 154 Ariz. at 46, n. 2, 739 P.2d at 1363, n. 2.

The most commonly used legal dictionary contains the following definition of "preponderance of the evidence":

Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proven is more probable than not. *Braud v. Kinchen*, La. App., 310 So.2d 657, 659. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability. The word "preponderance" means something more than "weight"; it denotes a superiority of weight, or outweighing. The words are not synonymous, but substantially different. There is generally a "weight" of evidence on each side in case of contested facts. But juries cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side.

Black's Law Dictionary 1064 (5th ed. 1979).

The "preponderance of the evidence" standard is sometimes referred to as requiring "fifty percent plus one" in favor of the party with the burden of proof. One could image a set of scales. If the evidence on each side weighs exactly evenly, the party without the burden of proof must prevail. In order for the party with the burden

to prevail, sufficient evidence must exist in order to tip the scales (even slightly) in its favor. See generally *United States v. Fatico*, 458 U.S. 388, 403-06 (E.D. N.Y. 1978), *aff'd* 603 F.2d 1053 (2nd Cir. 1979), *cert.denied* 444 U.S. 1073 (1980); *United States v. Schipani*, 289 F.Supp. 43, 56 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969).³

VI. STANDARD FOR DETERMINING NAVIGABILITY

The statutes defines a navigable watercourse as follows:

"Navigable" or "navigable watercourse" means a watercourse that was in existence on February 14, 1912, and at that time was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.

A.R.S. § 37-1101(5).

The foregoing statutory definition is taken almost verbatim from the U.S. Supreme Court decision in *The Daniel Ball*, 77 U.S. (10 Wall) 557, 19 L.Ed. 999 (1870), which is considered by most authorities as the best statement of navigability for title purposes. In its decision, the Supreme Court stated:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over

³ In a recent Memorandum Decision of the Arizona Court of Appeals, the Defenders of Wildlife and others through their representative, Arizona Center for Law in the Public Interest, attacked the constitutionality of the burden of proof for navigability determination by the Commission specified in A.R.S. § 37-1128(A). In that case, the Defenders claimed that the burden of proof specified in the statute conflicts with federal law and should be declared invalid because it is contrary to a presumption favoring sovereign ownership of bedlands. In discussing and rejecting Defenders position the Court stated: "... In support of this argument, Defenders cite to our decision in *Defenders*, see 199 Ariz. At 426, ¶ 54, 18 P.3d at 737, and to *United States v. Oregon*, 295 U.S. 1, 14 (1935). But neither of these decisions held that the burden of proof in a navigability determination must be placed on the party opposing navigability. Moreover, this court has twice stated that the burden of proof rests on the party asserting navigability. *Hassell*, 172 Ariz. At 363 n. 10, 837 P.2d at 165 n. 10; *O'Toole*, 154 Ariz. At 46 n. 2, 739 P.2d at 1363 n. 2. We have also recognized that a 'preponderance' of the evidence appears to be the standard used by the courts" as the burden of proof. *Defenders*, 199 Ariz. At 420, ¶ 23, 18 P.3d at 731 (citing *North Dakota v. United States*, 972 F.2d 235, 237-38 (8th Cir. 1992)). Defenders have not cited any persuasive authority suggesting that these provisions in § 37-1128(A) are unconstitutional or contrary to federal law. We agree with this court's prior statements and conclude that neither placing the burden of proof on the proponents of navigability nor specifying the burden as a preponderance of the evidence violates the State or Federal Constitutions or conflicts with federal law." *State of Arizona v. Honorable Edward O. Burke* 1 CA-SA 02-0268 and 1 CA-SA 02-0269 (Consolidated); Arizona Court of Appeals, Division One, (Memorandum Decision filed December 23, 2004).

which trade and travel are or may be conducted in the customary modes of trade and travel on water.

77 U.S. at 563.

In a later opinion in *U.S. v. Holt Bank*, 270 U.S. 46 (1926), the Supreme Court stated:

[Waters] which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the [water] in its natural and ordinary condition affords a channel for useful commerce.

270 U.S. at 55-56.

The Commission also considered the following definitions contained in A.R.S. § 37-1101, which are generally used by the authorities in applying the federal test for navigability to assist it in determining whether the Santa Cruz River was navigable at statehood.

11. "Watercourse" means the main body or a portion or reach of any lake, river, creek, stream, wash, arroyo, channel or other body of water. Watercourse does not include a man-made water conveyance system described in paragraph 4 of this section, except to the extent that the system encompasses lands that were part of a natural watercourse as of February 14, 1912.

5. "Navigable" or "navigable watercourse" means a watercourse that was in existence on February 14, 1912, and at that time was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.

4. "Man-made water conveyance system" means:

(a) An irrigation or drainage canal, lateral canal, ditch or flume.

(b) A municipal, industrial, domestic, irrigation or drainage water system, including dams, reservoirs and diversion facilities.

(c) A channel or dike that is designed, dedicated and constructed solely for flood control purposes.

(d) A hydropower inlet and discharge facility.

(e) A canal, lateral canal, ditch or channel for transporting central Arizona project water.

3. "Highway for commerce" means a corridor or conduit within which the exchange of goods, commodities or property or the transportation of persons may be conducted.

2. "Bed" means the land lying between the ordinary high watermarks of a watercourse.

6. "Ordinary high watermark" means the line on the banks of a watercourse established by fluctuations of water and indicated by physical characteristics, such as a clear natural line impressed on the bank, shelving, changes in the character of the soil, destruction of terrestrial vegetation or the presence of litter and debris, or by other appropriate means that consider the characteristics of the surrounding areas. Ordinary high watermark does not mean the line reached by unusual floods.

8. "Public trust land" means the portion of the bed of a watercourse that is located in this state and that is determined to have been a navigable watercourse as of February 14, 1912. Public trust land does not include land held by this state pursuant to any other trust.

Thus, the State of Arizona in its current statutes follows the Federal test for determining navigability.

VII EVIDENCE RECEIVED AND CONSIDERED BY THE COMMISSION

Pursuant to A.R.S. § 37-1123, and other provisions of Title 37, Chapter 7, Arizona Revised Statutes, the Commission received, compiled, and reviewed evidence and records regarding the navigability and nonnavigability of the Santa Cruz River from the Mexican border to the confluence with the Gila River. Evidence consisting of written documents, studies, newspapers and other historical accounts, pictures, testimony and recordings, were submitted. In all there were more than 23 separate documentary filings. The Arizona State Land Department, Arizona Center for Law in the Public

Interest, Central Arizona Paddlers Club, Arizona Audubon Council, Friends of Arizona Rivers, Rio Rico Properties, Inc., and several individuals including Richard Lee Duncan, Mark Larkin, James T. Braselton, Leonard and Phillip Halpenny, Frank Brophy, Jr., Brian Woodford, Amy Langerfeld, Nancy Orr and Jean Keller submitted evidence including letters and maps regarding the navigability or nonnavigability of the Santa Cruz River. The State Land Department submitted a comprehensive study dated November 1996, prepared by S.F.C. Engineering Company, in association with George V. Sobel Consulting Engineers, J. E. Fuller Hydrology and Geomorphology, Inc., SWCA, Inc. Environmental Consultants, University of Arizona Water Resources Research Center and the Arizona Geological Survey, through a contract with the Arizona State Land Department. An updated version of this report, dated January 12, 2004, was also submitted and reviewed. The Arizona Center for Law in the Public Interest submitted a comprehensive brief pertaining to the Santa Cruz River and other rivers in the state. Mr. Leonard C. Halpenny submitted a comprehensive review of the hydrology of the Santa Cruz basin in the vicinity of the Santa Cruz-Pima County line, prepared by Water Development Corporation, consultants in water resources, and further submitted a paper presented at the first annual conference of the Arizona Hydrological Society on September 16, 1988, regarding the hydrology of the Santa Cruz basin. The list of evidence and records, together with a summarization, is attached as Exhibit "D." The Commission also heard testimony and received and considered evidence at the public hearings held in Tucson on January 22, 2004, in Nogales on March 11, 2003, and in Florence on March 9, 2004. The meeting minutes of those hearings, as well as the final hearing held on September 16, 2004 at in Phoenix, Arizona, which the Commission found and determined that the Santa Cruz River was nonnavigable on the day Arizona became a state, are attached as Exhibit "E."

A. Prehistoric or Pre-Columbian Conditions on Santa Cruz River Watershed

The paleoindian tradition (13500 B.C. to 8000 B.C.) and early stages of the subsequent cultural tradition, the archaic period, are not as well represented along the Santa Cruz River as they are along the San Pedro River. Some Clovis points have been found in excavations along the Santa Cruz River, but the situation along the Santa Cruz contrasts sharply with the San Pedro River valley where varied Clovis kill sites have yielded evidence that continues to be remarkable in the context of new world prehistory. Since the weather and climate is very similar, the lack of paleoindian sites in the Santa Cruz River valley is probably due to the fact that they have not been discovered or, if they were present, have been destroyed by erosion or covered over by flood deposits.

The archaic period (8000 B.C. to 100 B.C.), sometimes known as the Cochise culture, is better represented by known sites in the Santa Cruz River valley. These sites are mostly occasional camps indicating that the primary activity was to gather and prepare food. Some structures such as temporary brush shelters have been found. As is well documented in other sites in southern Arizona, the Archaic culture developed into the Hohokam culture some time between 300 A.D. and 300 B.C. Excavations in the Tucson basin area have lent support to the theory that the Hohokam culture developed, at least in this area, out of the archaic tradition. Others maintain that the Hohokam culture was greatly influenced by immigration from meso-america. In the Tucson basin the evidence shows a transition between archaic and Hohokam traditions that ultimately saw the development of crop dependency, new and better ceramic and lithic technology and larger and more permanent houses. Burials during this period show a mixture of inhumations and cremations indicating the transition of culture. After 400 A.D. the prehistoric occupation along the lower Santa Cruz River greatly resembles the Hohokam cultural patterns and appears to be greatly influenced by the Hohokam culture developing along the Gila River to the north. There is some

indication of Mogollon culture influence during this period in the middle Santa Cruz River valley. The upper Santa Cruz River valley, primarily in Santa Cruz County, shows little, if any, settlement during this early period.

In the lower and middle Santa Cruz valley there is evidence of continuing village development after 750 A.D. and ball courts are found, which is indicative of meso-american influence. The population expanded somewhat between 750 and 950 A.D. and there is evidence of seasonal flood water farming using the natural runoff from gullies and arroyos in the Tucson basin and other areas of the middle Santa Cruz River valley. The population apparently continued to expand and villages or settlements became larger although fewer in number up through 1400 A.D. Platform mounds appeared and there was more extended use of non-riverine agricultural systems and well as flood water farming. Probably due to lack of water there is not much evidence of irrigated farming, although in the middle and lower Santa Cruz River valley some canals have been found, but not nearly to the extent of their usage in the Gila and Salt River valley. By 1400 many of the prehistoric sites appear to have been abandoned. There appears to have been a large decline in population, and the few sites that remained occupied after 1400 have been tied into the upper Pima culture. During this prehistoric period, the river appears to have been intermittent and did flow periodically above ground, especially when fed by springs in the Canoa, San Xavier, and Tucson areas. These early indigenous inhabitants used the valley as a transportation corridor, but there is no evidence whatsoever of any use of the river for travel or navigation. It was a source of water for people traveling through the area and sometimes in flood season could be used for irrigation.

B. Historic Development of Santa Cruz Watershed

The earliest Spanish or western explorers to enter southern Arizona was a party led by Alvaro Nunez Cabeza de Vaca who ventured through the southeastern portion of the state in 1536. Because of tales of rich Indian cities further north, "the

Seven Cities of Cebola," the viceroy of New Spain sent Fray Marcos de Niza to explore the region in 1539. The following year de Niza returned with a full scale expedition led by Don Francisco de Coronado. De Niza and Coronado did not travel up the Santa Cruz valley, although Coronado may have gone through the San Rafael valley to the east of the Santa Cruz valley. There is no history of any Spanish travelers or settlers in the Santa Cruz valley until 1691 when a Jesuit missionary, Father Eusebio Francisco Kino, came to the valley to establish missions and convert the indigenous population to Christianity. The impact Father Kino had on the Santa Cruz valley, either directly or indirectly, cannot be underestimated. The first large settlement in the area was the Jesuit mission of Santa Maria Soamca, later known as Santa Cruz (Mexico). Father Kino used the Santa Cruz valley extensively as a travel route into the northern portion of Pimeria Alta. His missionary efforts in the twenty years between 1691 and his death in 1711, led to the establishment of San Xavier del Bac, Guevava, and Tumacacori. Some smaller missionary posts or visitas were also established at Tubac and San Augustin del Tucson. The greatest impact Kino and subsequent missionaries had in the Santa Cruz valley was the introduction of new technologies in crops and domestic animals. The new information and crop species brought by the Spanish missionaries to the Pima Indians living in and near the Santa Cruz valley led to an expansion of farming. The crops of the missions relied on irrigation from the Santa Cruz River surface waters flowing through canals, some of which may have been originally dug by the Hohokam. The missionaries also brought cattle, sheep, and goats into the area from the herds maintained further south in Mexico.

In 1775, Captain Juan Batista de Anza came to the Santa Cruz valley where the missions were under pressure from marauding Apaches. A presidio was established at Tubac in 1751 and one was established at San Augustin del Tucson in 1757, although they were defended or manned only intermittently. In 1767, the Jesuits were expelled from New Spain and the Franciscans entered the area, taking their place

and taking charge of a seriously deteriorated mission system. The churches presently seen at San Xavier del Bac and Tumacacori were completed by them in 1797 and 1822, respectively, although prior to their construction they were centers of missionary activity.

Along with the salutary effects, Europeans brought disease which had a devastating effect on the Indian populations in the valley since they were not immune to western European diseases. Although mining on a small scale had been practiced for centuries by Indians, primarily in small silver mines in the Santa Rita Mountains, the Spanish expanded the mining activity and attempted to establish silver and gold mines. They were not particularly successful in this endeavor, primarily due to the opposition of the Jesuit Order. In order to encourage settlement in Pimeria Alta, the Spanish government in the 17th and 18th centuries made certain land grants to individuals who would go into the area and live on them. After 1821, when Mexico became free of Spain, it continued this practice. Eight claims of land grants were made in the Santa Cruz valley area, the oldest being Tumacacori/Calabasas which dated from 1806. In 1776, the Presidio at Tucson was officially established and permanently manned after that date. Thus the town of Tucson grew up around the Presidio and since that time has been the center of population in southern Arizona.

In 1846 war broke out between the United States and Mexico, which was ended by the Treaty of Guadalupe Hidalgo, wherein Mexico ceded to the United States all of its northern territories north of the Gila River. Almost immediately after this treaty, gold was discovered in California and a large number of people traveled through Arizona on their way to the gold fields of California. Since one of the best routes was south of the Gila River, the United States undertook to buy from Mexico enough land to allow this southern transcontinental route, and this was accomplished in the Gadsden Purchase of 1853 whereby the United States annexed the land south of the Gila River to the present international boundary. Immediately thereafter, a survey

was undertaken to locate a railroad route through southern Arizona to California. Also, the Butterfield Stage Line was established in 1857 from San Antonio through southern Arizona, stopping at Tucson on its way to San Diego and Los Angeles. Some military posts such as Ft. Lowell in Tucson were established in the 1850's, but the United States military presence in Arizona was curtailed by the occurrence of the Civil War. After that War, in 1865, a number of military posts were established in Arizona to quell the marauding Apaches.

The Southern Pacific Railroad was completed from the east as far as Tucson in 1881. Other railroad lines were built, connecting Tucson with Nogales, which grew in size and importance because of the railroad, and north to Phoenix. With the capture of Geronimo in 1886, the Indian Wars were at an end. These two events allowed an expansion of commerce, mining, and ranching in southern Arizona. In the 1880's a large number of cattle were brought to Arizona and cattle ranches established. In the Santa Cruz valley, trees and wood were harvested for fuels and as material to build houses and other structures. Ditches and diversion dams were built to divert water for crops. Groundwater pumping was brought into the area in 1890, which expanded the number of crops grown and this, compounded with the need for water for mining activities and the need for additional water for the increasing population, eventually lowered the water table. Droughts followed by severe storms, coupled with the human activity, resulted in flooding which caused a great deal of erosion and arroyo cutting in southern Arizona, especially in the Santa Cruz River channel.

**C. Conditions in the Santa Cruz River Valley
During the Last Half of the 1800's up to Statehood in 1912**

Early visitors to the Santa Cruz River valley had many descriptions of the river. In the upper valley in Santa Cruz County, it was a low-flowing perennial stream with some marshy areas and cienegas. Near the Pima County line, the river generally went subsurface and was thus dry most of the year but surfaced again near San Xavier

and Tucson. This was due to a geological change from high bedrock in Santa Cruz County to a deep alluvial system in Pima County. In those areas where the river flowed, the Indian population assisted by the missionaries conducted farming from the surface waters. There are reports of fish being caught in pools along the perennial flow areas of the river, but there is no record of the development of any commercial fishing industry. In the lower Santa Cruz River, from Marana on northwest, the river only flowed intermittently and as a result of precipitation.

Although there are reports of attempts at floating down the Santa Cruz River, there are no reports of any successful navigation over any significant portion or reach of the river. Two lakes were built in the 1860's to the 1880's south of Tucson which impounded floodwaters and were maintained by flows from springs and cienegas near Sentinel Hill or "A" Mountain. The waters impounded by these lakes were used to grind grains to supply flour to the nearby community. They were also popular as recreation areas. The drought and flood cycles of the late 1880's and 1890's severely affected these lakes and washed out the dams that impounded them. As the population grew, there were more wells and pumping of water from the basin and wood cutting to the point where most of the trees in the valley near Tucson were cut down. Most of the riparian trees had been cut for use in building homes and other structures and for firewood. Mining activity in the late 1800's and since statehood has required a great deal of water which has resulted in a significant lowering of the water table. By 1910, the entire base flow of the river at both Nogales and Tucson was diverted for agriculture, leaving the mines to pump subsurface water for their operations. Population growth, mining and agriculture have led to the loss of perennial water, an increase in groundwater withdrawal, and an extensive change in the vegetation structure. These factors combined with the alternate drought and flood conditions of the late 1880's and 1890's and the early part of this century caused a great deal of erosion, channel cutting and arroyoization of the upper Santa Cruz River valley.

A land speculator portrayed the Santa Cruz River at Calabasas, just downstream from Nogales, as capable of floating steamboats in the 1880's for consumption by prospective land purchasers back east. This was pure fiction but gave rise to the belief, occasionally even today, that the river was navigable by large ships.

Although the Santa Cruz River has never within history or known prehistory been considered a navigable river, additional requirements for water for mining activities, agriculture and general requirements due to increased population diminished the amount of water available in the riverbed by a significant amount by 1912. As of the date of statehood, while there was some flow in the far upper reaches of the Santa Cruz River, i.e. in Santa Cruz County, the remainder of the river would have to be considered ephemeral or intermittent at best. The lower reach of the river from Marana north to the confluence with the Gila River has always been dry, flowing only in response to significant precipitation. The Santa Cruz River valley has served as an overland trade route from prehistoric times, but there is no documented record of any trade or travel on the river during the period leading up to statehood. Travel in or near the Santa Cruz River was accomplished by horseback, wagon, pack mule, trains and later automobiles as the road system improved. The Santa Cruz River is not listed in the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401 through 467(e)).

D. Conditions At and After Statehood

There is no record indicating that the lower Santa Cruz River ever supported a perennial flow. The upper Santa Cruz River may be considered prior to statehood to have had a perennial flow, but even then, it was intermittent. By 1910, all of the flow of the river was diverted for municipal use or irrigation and frequently this did not produce sufficient water. The farmers would substitute pumping or would augment the river flow for irrigation by pumping from subsurface waters and mines in the area relied almost entirely on subsurface pumping of water. By statehood, the use of the diversion of water for irrigation and municipal use and subsurface pumping for

irrigation and mining use was so extensive that the vegetation and foliage along the river changed considerably with those plants requiring a near-surface source of water such as cottonwood had died out and were cut and used by the local populace for firewood. The cienegas and riparian areas in the upper reach of the Santa Cruz River from Nogales north dried up also. The Santa Cruz River can clearly not be called navigable or susceptible of navigability as of the date of statehood.

E. Title to Lands Covered by Mexican Land Grants

In the course of a hearing on the Santa Cruz River, the owners of Rio Rico Properties, Inc., by and through their attorneys, filed a memorandum with the Commission claiming that the Commission and the State of Arizona had no jurisdiction to consider the navigability of that portion of the Santa Cruz River encompassed within their property. Rio Rico Properties, Inc. is the successor in interest to the heirs of Luis Maria Cabeza de Baca, who acquired a land grant from the Mexican government in 1821 known as the "Las Vegas Grandes" near Las Vegas, New Mexico. Since this grant was in conflict with another later grant, Congress passed an Act in June of 1860 (12 Stat. 71, c. 167) allowing the heirs of Cabeza de Baca to select an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. In 1863, as one of the five parcels, the Baca heirs selected the tract known as Baca Float No. 3, which is the area encompassed by the property now owned by Rio Rico Properties, Inc.⁴ The owners and holders of Baca Float No. 3 claimed to hold their title by Act of Congress from the original Las Vegas land grant which was made in 1821 prior to the treaties.

The position of the holders of what was formerly Mexican Land Grant land is that the original Mexican Land Grant was made prior to the Treaty of Guadalupe Hidalgo (9 U.S. Stat. 922, Feb. 2, 1848) ending the war between the United

⁴ In American land law, particularly in the western states, a Float is a certificate authorizing the entry by the holder of a certain quantity of land not yet specifically selected or located. Black's Law Dictionary, 5th ed. 1979.

States and Mexico and also before the treaty formalizing the Gadsden Purchase (10 U.S. Stat. 1031, Dec. 30, 1853) whereby the United States bought from Mexico the area south of the Gila River to the present international border. Both of these treaties provide that the United States would honor property rights and titles in land held by Mexican citizens prior to the date of the treaties. Because there were no title restrictions under the Mexican Land Grants and Mexican law apparently did not recognize the Public Trust Doctrine as we know it (whereby the title to land under tidal waters and navigable rivers and the banks thereof was held by the sovereign for the benefit of all the people), it is their position that their title to the Santa Cruz River where it flowed through Baca Float No. 3 should be absolute and not subject to the Public Trust Doctrine. In support of their position, they cite City and County of San Francisco v. Le Roy, 138 U.S. 656, 11 S.Ct. 364, 34 L.Ed. 1096 (1891); Knight v. United Land Association, 142 U.S. 161, 12 S.Ct. 258, 35 L.Ed. 974 (1891); Shaw v. Kellogg, 170 U.S. 312, 18 S.Ct. 632, 42 L.Ed. 1050 (1898); United States v. Coronado Beach Co., 255 U.S. 472, 41 S.Ct. 378, 65 L.Ed. 735 (1921).

Based on the foregoing authority, it appears that this position has considerable merit. However, in view of our finding in this report, we need not make a specific finding as to jurisdiction.

VIII. FINDINGS AND DETERMINATION

The Commission conducted a particularized assessment of equal footing claims the State of Arizona might have to the bed and banks, up to the high-water mark, of the Santa Cruz River, and based on all of the historical and scientific data and information, documents, and other evidence produced, finds that the Santa Cruz River was not used or susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water as of February 14, 1912.

The Commission also finds that the Santa Cruz River, while considered to be a perennial stream, has an almost insignificant flow during the dry seasons of the year. As of February 14, 1912 and currently, it flows/flowed primarily in direct response to precipitation and seasonal storms.

The Commission also finds that there is no evidence of any historical or modern commercial boating having occurred on the Santa Cruz River.


The Commission also finds that there is no evidence of any commercial fishing having occurred on the Santa Cruz River.


The Commission further finds that all notices of these hearings and proceedings were properly and timely given.

In view of the foregoing, the Commission, pursuant to A.R.S. § 37-1128A, finds and determines that the Santa Cruz River in Cochise, Pima and Pinal Counties, Arizona, was not navigable as of February 14, 1912.

DATED this 18 day of October, 2006.


Earl Eisenhower, Chair

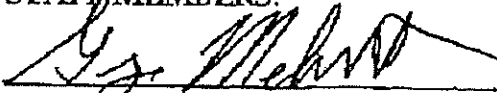

Dolly Echeverria, Vice Chair


Jay Brashear, Member


Cecil Miller, Member


James Henness, Member

STAFF MEMBERS:


George Mehnert
Executive Director


Curtis A. Jennings
Legal Counsel to the Commission

EXHIBIT A

EXHIBIT A

LEGAL NOTICE**STATEMENT OF INTENT**
State of Arizona
Navigable Stream
Adjudication Commission

Pursuant to A.R.S. §37-1501, et. seq., the Arizona Navigable Stream Adjudication Commission (ANSAC) is planning to hold a watercourse navigability hearing regarding the Santa Cruz River in Santa Cruz County, Arizona. Notice is hereby given, pursuant to A.R.S. §37-1523 (B), that ANSAC intends to receive, review and consider evidence regarding the navigability or nonnavigability of the Santa Cruz River in Santa Cruz County. Interested parties are requested to file all documentary evidence they propose to submit to ANSAC by January 24, 2009. All evidence submitted to ANSAC will be the property of ANSAC and the State of Arizona. Evidence submitted will be available for public inspection at the ANSAC office during regular business hours.

Interested parties should submit original and three copies of documents to be submitted to ANSAC to the following address: ANSAC, 1700 West Washington, Suite 402, Phoenix, Arizona 85001. The telephone number is (602) 542-5214. The website address is <http://www.aznavstream.com>. The email address is ansac@aznavstream.com.

Individuals with disabilities who need a reasonable accommodation to communicate evidence to ANSAC, or who need that information in an alternative format may contact the ANSAC office at (602) 542-5214 to make their needs known.

Pub: 12/24, 12/31, 1/7/09
Rev: State of AZ NSA
Nogales International

AFFIDAVIT OF PUBLICATION

STATE OF ARIZONA

COUNTY OF SANTA CRUZ

33.

Bob Kimball being of first duty sworn, deposes and says: that he/she is Publisher of the NOGALES INTERNATIONAL, a newspaper published in the County of Santa Cruz, State of Arizona, and of general circulation in said County, State and elsewhere, and that the hereto attached legal notice Statement of Intent State of Arizona Navigable Stream Adjudication Commission

was printed and published correctly in the regular and entire issue of said NOGALES INTERNATIONAL for 3 issues; that the first publication was made on the 24 day of Dec, 20 02, and the last publication thereof was made on the 7 day of Jan, 20 03.

NOGALES INTERNATIONAL

By Sub Kimball
Subscribed and sworn to before me this Jan
day of 07, 20 03

Notary Public

My commission expires Jan. 4, 2005
OFFICIAL SEAL
SANDRA MORALES
Notary Public - State of Arizona
SANTA CRUZ COUNTY

A-1

STATE OF ARIZONA
MARIQUITA GONZALEZ
Notary Public - Arizona
Pima County
My Commission Expires 09/30/06
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STATE OF ARIZONA COUNTY OF PIMA

Janice Anderson, being first duly sworn,
upon oath deposes and says:

That he/she is the agent of TUCSON NEWSPAPERS, publishers of
THE ARIZONA DAILY STAR / TUCSON CITIZEN,
newspapers of general circulation in the County of Pima, State of Arizona,
published at Tucson, Arizona, and that the statement hereto attached is a true representation
of the advertisement published in the said paper(s) 3 times on the
following days:

Nov 14 2003 in class 918 T-Tucson Classifieds - Daily
Nov 21 2003 in class 918 T-Tucson Classifieds - Daily
Nov 28 2003 in class 918 T-Tucson Classifieds - Daily

Janice Anderson
Agent

Subscribed and sworn to before me this

28th day of November, A.D. 2003



VALERIE S. GONZALES
Notary Public - Arizona
Pima County
Expires 09/30/06

My Commission Expires

Notary Public

Valerie S. Gonzales

M332223603601

A-2

COUNTY OF PINAL

State of Arizona

Pursuant to A.R.S. §17-1107, et seq., the Arizona Navigable Waterways Antiquities Commission (ANSAC) is planning to make a watercourse easement listing of the main stem of the small and minor watercourses in Pinal County, Arizona. Notice is hereby given, pursuant to A.R.S. §17-1105 (B), that ANSAC intends to provide notice and information to the public on the navigability, ownership, and other information regarding the small and minor watercourses in Pinal County. Interested parties are asked to file all documentary evidence on or before the date that ANSAC is planning to submit to ANSAC. All evidence submitted to ANSAC will be the property of ANSAC and the State of Arizona. Evidence submitted will be available for public inspection at the ANSAC office during regular office hours.

The list of small and minor watercourses

Pinal, Greiner Wash, Cruz Wash, Deer
Creek - Pinal, Deer Creek
Graham/Pinal, Dodge Tank Wash, Dodge
Wash, Dodson Wash - Pinal, Donnelly
Wash, Drew Wash, Dripping Spring, Dry
Camp Canyon, Eagle Wash, Eschmazin
Wash, Faraway Wash, First Water Creek,
Flag Wash, Garden Creek, Georgia Wash,
Gold Wash, Good James Wash, Hackberry
Creek - Pinal, Hackberry Wash - Pinal
Hager Canyon Stream, Haunted Canyon
Creek, Hells Hat Arch, Holy Joe Canyon,
Korse Camp Canyon, Horse Foot Wash,
Indian Bend Wash - Pinal, Indian Well
Wash, Irvine Wash, James Wash, Jim
Thomas Wash, Kake Wash, Korpe Wash,
La Barge Creek, Laramie Creek, Little
Ash Creek, Pinal, Little Salt Lake, Horst
Fork, Mammoth Wash, Margaret Wash,
Nease Wash, Pinal, Milk Ranch Wash,
Milky Wash, Mineral Spring - Pinal,
Mulberry Wash - Pinal, North Branch San
North Fork Clark, Oak Creek - Pinal,
Palatine Canyon, Sapona, Palmer Wash,
Paragon Spring, Springs, Spontaneous
Springs, Fanning Wash, Piper Springs Wash,
Polecat Wash, Pottery Wash, Pueblo Wash
Wash - Pinal, Quail Creek, Rainbow
End Wash, Rancho del Cielo, Red Rock
Wash, Redoubt Canyon, Resaca Creek,
Reynolds Wash, Ribway Wash, Ritten-
bach, Rock Creek - Pinal, Rock Wash -
Pinal, Romero Wash, Santa Cruz Wash,
Santo Domingo Wash, Sedona Wash, Silver
Knoll Wash, Silver River Wash, Snaker
Wash, Snake Wash, Spanish Springs
Clark Spring, Soda Spring, Steamboat
Wash - Pinal, Smoke Wash, Snowflake
Canyon, Sun Wash, Sunset Wash,
Tribal Wash, Tumbleweed Wash, Turkey
Wash, Tom Mays Wash, Trout Creek,
Rucker Wash, Greenman Wash,
Walrus Wash, West Wash, West
Canyon, St George Wash, Yucca Wash,
Greene Wash, Iron Point, Whitehorn
Springs, Willow Springs, Zappa Wash,
and all other named settlements.

DONOVAN M. KRAMER, SR. first being duly sworn deposes and says: That he is a native born citizen of the United States of America, over 21 years of age, that he is publisher of the Casa Grande Dispatch, a daily newspaper published at Casa Grande, Pinal County, Arizona, Monday through Saturday of each week; that a notice, a full, true and complete printed copy of which is heretunto attached, was printed in the regular edition of said newspaper, and not in a supplement thereto, for THREE ~~COPIES~~ issues the first publication thereof having been on the 15TH

Sixth publication _____

day of January, A.D. 1901

Notary Public in and for the State of Arizona
 Debbie L. Muirvine
 Notary Public - Arizona
 Pinal County
 My Commission Expires
 October 23, 2016

A-3

A-3

EXHIBIT B

EXHIBIT C

EXHIBIT D

Evidence Log

Hearing No. 03-002-NAV

Page No.

1

Arizona Navigable Stream Adjudication Commission

Santa Cruz County, Santa Cruz River
March 11, 2003

Item Number	Received Date	Source to ANSAC	Description	Entry By
1	6/9/00 approx	Evidence on hand at AN-SAC.	Draft Final Report Small & Minor Watercourses Analysis for Santa Cruz County, Arizona dated June 9, 2000.	George Mehnert
2	8/1/00 approx	Evidence on hand at AN-SAC.	Final Report Small & Minor Watercourses Analysis for Santa Cruz County, Arizona dated August 1, 2000.	George Mehnert
3	8/16/00 approx	Evidence on hand at AN-SAC.	Computer printout pages of PowerPoint slide presentation by Stantec and Jon Fuller, titled AN-SAC Public Hearing Santa Cruz County.	George Mehnert
4	9/7/98	Evidence on hand at AN-SAC	Small and Minor Watercourse Criteria Final Report.	George Mehnert
5	9/7/99	Evidence on hand at AN-SAC	Final Report, 3 County Pilot Study.	George Mehnert
6	Received on various dates.	Evidence on hand at AN-SAC previously submitted for watercourse hearings in Santa Cruz County and included in Commission report to legislature, 1 volume.	1. Letter from David Baron dated February 18, 1997. 2. Letter from Al Anderson dated December 26, 1997. 3. Letter from Mark Larken dated February 9, 1998. 4. Memorandum from Lee A. Storey dated February 19, 1998. 5. Comments and Exhibits submitted by Richard Lee Duncan February 22, 1998. 6. Letter from James Braselton dated September 19, 1997. 7. Review of	George Mehnert

D

Evidence Log Continuation Page

Hearing No. 03-002-NAV

Page No.

2

Arizona Navigable Stream Adjudication Commission

Santa Cruz County, Santa Cruz River
March 11, 2003

Item Number	Received Date	Source	Description	Entry By
			Hydrogeology submitted by Leonard and Philip Halpenny. 8. 1992 Boating Survey by Central Arizona Paddlers Club. 9. Santa Cruz River final report by SFC Engineering, George V. Sabol, SWCA, Inc., and J. E. Fuller, dated November 1996.	
7	1/22/03	Frank C. Brophy Jr	Ltr Re: Babacomari River (Creek), Tributary of the San Pedro River.	
8	3/11/03	Jack August	Paper entitled The Upper Santa Cruz River: History of Lessening Stream.	George Mehnert
9	3/1/03	Brian Woodford	Map of Arizona on which it is alleged Baca Float Number 3 is outlined in red.	George Mehnert
10	3/11/03	Jack August	Paper entitled Baca Float Number Three: An Institutional and Legal History.	George Mehnert
11	3/11/03	Amy Langenfeld	Memorandum submitted for hearing March 11, 2003.	George Mehnert
12	3/10/03	Vera Kornylak	Letter dated 3/7/03 and Book titled The Lessening Stream by Michael F. Logan.	George Mehnert
13	3/10/03	Vera Kornylak	Sonorensis, Arizona Sonora Desert Museum Newsletter, Summer 1998	George Mehnert
14	3/10/03	Vera Kornylak	Article, Desert Plants by Dean A. Hendrickson and W.L. Minckley.	George Mehnert
15	3/10/03	Vera Kornylak	Article Water Follics by Robert Glennon	George Mehnert
16	3/10/03	Vera Kornylak	Article Arroyos and Environmental Change in the SouthWest by Ronald U. Cooke and Richard W. Reeves—excerpts.	George Mehnert
17	3/10/03	Vera Kornylak	Article, Arizona Highways April 1988, El Río de la Santa Cruz.	George Mehnert

Evidence Log Continuation Page

Hearing No. 03-002-NAV

Page No.

3

Arizona Navigable Stream Adjudication Commission

Santa Cruz County, Santa Cruz River
March 11, 2003

[illegible]

EXHIBIT E



**STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION**

1700 West Washington, Room 404, Phoenix, Arizona 85007

Phone (602) 542-9214 FAX (602) 542-9220

E-mail: streams@mindspring.com Web Page: <http://www.azstreambeds.com>

GEORGE MEHNERT
Executive Director

**Meeting Minutes
Nogales, Santa Cruz County
Hearing Regarding Santa Cruz River
in Santa Cruz County
March 11, 2003**

COMMISSION MEMBERS PRESENT

Jay Brashear, Dolly Echeverria, Earl Eisenhower, James Hennessy, and Cecil Miller

COMMISSION MEMBERS ABSENT

None.

STAFF PRESENT

Curtis Jennings, George Mehnert, Tom Vogt.

1. CALL TO ORDER

Chair Eisenhower called the meeting to order at approximately 1:30 p.m.

2. ROLL CALL

All Commissioners present.

Following roll call Chair Eisenhower explained there will be two hearings today; first he will convene the small and minor watercourses hearing for Santa Cruz County, recess that, and convene the major watercourse Santa Cruz River hearing, hold that hearing to its conclusion, and then return and complete the Santa Cruz County small and minor watercourses hearing.

Chairman Eisenhower convened the small and minor watercourses hearing, recessed it, and convened the Santa Cruz River major watercourse hearing.

3. SANTA CRUZ RIVER WATERCOURSE HEARING (discussion and action).

Commissioner Brashear explained the Commission did not have the authority to determine constitutional matters, but that the Commission was hear to consider navigability of streams and that was what they were going to do.

The following people appeared and gave testimony or asked questions: Amy Langenfeld, Steve Wene, Brad Woodford, Jack August, Vera Komylak, Philip Halpenny, Cheryl Doyle, V. Ohtozawa-Chaturpon, Mark McGinnis

CALL FOR PUBLIC COMMENT (comment sheets).

(Pursuant to Attorney General Opinion No. R99-006 [R99-002]. Public Comment: Consideration and discussion of comments and complaints from the public. Those wishing to address the Commission need not request permission in advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.)

E-1

Chairman Eisenhower asked if there were any other questions or comments from anyone. There were none.

Motion: To adjourn session on Santa Cruz River. Meeting adjourned at 2:50 p.m.
Motion by: Cecil Miller Second by: Jim Henness Vote: All aye

Respectfully submitted,



George Mehnert, Director

Date: March 13, 2003



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GEORGE MEHNERT
Executive Director

Meeting Minutes
Tucson, Pima County, Arizona
January 22, 2004

COMMISSION MEMBERS PRESENT

Jay Brashear, Earl Eisenhower, James Henness, Cecil Miller.

COMMISSION MEMBERS ABSENT

Dolly Echeverria

STAFF PRESENT

George Mehnert, Dir., Curtis Jennings, Legal Counsel.

1. **CALL TO ORDER.**

Chairman Eisenhower called the meeting to order at approximately 10:16 a.m.

2. **ROLL CALL.**

See above.

3. **APPROVAL OF MINUTES.**

A. **Minutes of December 16, 2003.**

Motion: To approve minutes.

Motion by: Cecil Miller. Second by: Jim Henness. Vote: All aye.

4. **HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SANTA CRUZ RIVER IN PIMA COUNTY, Cause Number 03-002-NAV.**

The following people appeared and gave testimony, other information, or asked questions on January 22, 2004: Cheryl Doyle, Jon Fuller.

HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SAN PEDRO RIVER IN PIMA COUNTY, Cause Number 03-004-NAV.

The following people appeared and gave testimony, other information, or asked questions on January 22, 2004: Cheryl Doyle, Jon Fuller.

5. **HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SMALL AND MINOR WATERCOURSES IN PIMA COUNTY, Cause Number 04-003-NAV.**

The following people appeared and gave testimony, other information, or asked questions on January 22, 2004: Cheryl Doyle, Jon Fuller.

6. **CALL FOR PUBLIC COMMENT (comment sheets).**

(Pursuant to Attorney General Opinion No. 199-006 [199-002], Public Comment: Consideration and discussion of comments and complaints from the public. Those wishing to address the Commission need not request permission in

E-2

advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.)

There was no public comment.

7. FUTURE AGENDA ITEMS AND ESTABLISHMENT OF FUTURE HEARINGS AND OTHER MEETINGS.

The Chair asked the director to go over the current calendar for scheduled meetings. Mr. Mehnert said there was a meeting scheduled for 8:00 a.m. on January 27, 2004 in Phoenix at which time the Commission may consider and may vote on the navigability of the Graham County small and minor watercourses, the Greenlee County small and minor watercourses, the San Francisco River, the Blue River, and the Lower Salt River.

Mr. Mehnert also said there is a hearing scheduled for March 9, 2004 in Florence, Arizona relating to the Pinal County small and minor watercourses, the Santa Cruz River, the San Pedro River, and the Gila River.

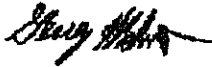
8. ADJOURNMENT.

Motion: To adjourn.

Motion by: Cecil Miller. **Second by:** Jim Henness. **Vote:** All aye.

Meeting adjourned at approximately 11:00 a.m.

Respectfully submitted,



George Mehnert, Director, January 23, 2004
Navigable Stream Adjudication Commission



STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION

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GEORGE MEHNERT
Executive Director

MEETING MINUTES

Floreza, Pinal County, March 9, 2004

COMMISSION MEMBERS PRESENT

Jay Brashear, Dolly Echeverria, Earl Eisenhower, Jim Henness, and Cecil Miller.

COMMISSION MEMBERS ABSENT

None.

STAFF PRESENT

George Mehnert, and Commission Legal Counsel Curtis Jennings.

1. CALL TO ORDER.

Chair Eisenhower called the meeting to order at approximately 10:00 a.m.

2. ROLL CALL.

See above.

3. APPROVAL OF MINUTES (discussion and action).

A. January 27, 2004 Maricopa County.

Motion by: Jim Henness Second by: Dolly Echeverria

Motion: To approve the minutes of January 27, 2004. Vote: All aye.

4. HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE GILA RIVER 03-007-NAV.

Testimony or other information was presented by Cheryl Doyle representing the State Land Department and by Alan Gookin, Engineer and John Heston, Attorney, representing the Gila River Indian Community. Physical documentary evidence was submitted by Mr. Gookin. (Please refer to agenda item number 8 regarding the testimony of Mr. Gookin and Mr. Heston.)

5. HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SAN PEDRO RIVER 03-004-NAV.

Testimony or other information was presented by Cheryl Doyle representing the State Land Department who stated her information would be the same as she had stated regarding item number 4 regarding the navigability or non-navigability of the Gila River.

At the end of the hearing regarding this matter Chairman Eisenhower announced that the taking of testimony and other evidence was closed.

6. HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SANTA CRUZ RIVER 03-002-NAV.

Testimony or other information was presented by Cheryl Doyle representing the State Land Department who stated her information would be the same as she had stated regarding item number 4 regarding the navigability or non-navigability of the Gila River.

At the end of the hearing regarding this matter Chairman Eisenhower announced that the taking of testimony and other evidence was closed.

7. HEARING REGARDING THE SMALL AND MINOR WATERCOURSES IN PINAL COUNTY 04-007-NAV.

Testimony or other information was presented by Cheryl Doyle representing the State Land Department who stated her information would be the same as she had stated regarding item number 4 regarding the navigability or non-navigability of the Gila River, and in addition discussed the small and minor watercourse report. In response to a question by Curtis Jennings Cheryl Doyle stated that the climatic and weather conditions at the time of the study were essentially the same as in 1912.

At the end of the hearing regarding this matter Chairman Eisenhower announced that the taking of testimony and other evidence was closed.

8. CALL FOR PUBLIC COMMENT (comment sheets).

E-3

(Pursuant to Attorney General Opinion No. 199-006 [R99-002]. Public Comment: Consideration and discussion of comments and complaints from the public. Those wishing to address the Commission need not request permission in advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.)

Alan Gookin asked permission to speak regarding agenda item number 4, the Gila River. Mr. Gookin indicated he had arrived late and had missed the presentation regarding the Gila River. He asked the Commission's indulgence and that they return to the Gila River matter so he could provide testimony and other evidence. The chair agreed and Mr. Gookin presented testimony and documentary physical evidence.

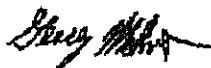
The Chairman restated that this is the final opportunity to submit testimony or other evidence regarding the navigability or non-navigability of the San Pedro and Santa Cruz Rivers.

9. **FUTURE AGENDA ITEMS AND ESTABLISHMENT OF FUTURE HEARINGS AND OTHER MEETINGS.**

10. **ADJOURNMENT.**

Motion by: Cecil Miller Second by: Jim Henness
 Motion: To adjourn Vote: All aye.
 Meeting adjourned at approximately 10:55 a.m.

Respectfully submitted,



George Mehnert, Director
 March 10, 2004



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GEORGE MEHNERT
Executive Director

MEETING MINUTES

Phoenix, Arizona September 16, 2004

COMMISSION MEMBERS PRESENT

Jay Brashear, Dolly Echeverria, Earl Eisenhower, and Cecil Miller.

COMMISSION MEMBERS ABSENT

Jim Hennessy

STAFF PRESENT

George Mehnert, and Commission Legal Counsel Curtis Jennings.

1. CALL TO ORDER.

Chair Eisenhower called the meeting to order at approximately 10:00 a.m.

2. ROLL CALL.

See above.

3. APPROVAL OF MINUTES (discussion and action).

A. June 28, 2004, Maricopa County.

Motion by: Dolly Echeverria Second by: Cecil Miller

Motion: To approve the minutes of June 28, 2004. Vote: All aye.

4. DISCUSSION AND ACTION REGARDING THE NAVIGABILITY OF THE SANTA CRUZ RIVER.

Motion by: Jay Brashear Second by: Cecil Miller

Motion: Non Navigable Vote: All aye.

Jay Brashear: Not only was there not a preponderance of evidence of navigability, there was no evidence at all, to speak of, presented regarding navigability.

5. DISCUSSION AND ACTION REGARDING THE NAVIGABILITY OF THE SAN PEDRO RIVER.

Motion by: Jay Brashear Second by: Dolly Echeverria

Motion: Non Navigable Vote: All aye.

Jay Brashear: I tried to pay particular attention to this river because of its many attributes and I gave it a really hard look. There may be many things that would cause us to maintain the San Pedro River just as it is but that is not within our charter regarding determination of navigability. It was never a highway of commerce.

Cecil Miller: Indicated he was fascinated by the history of the San Pedro but that does not make it navigable.

6. DISCUSSION AND ACTION REGARDING THE NAVIGABILITY OF THE SMALL AND MINOR WATERCOURSES IN PIMA COUNTY.

Motion by: Cecil Miller Second by: Dolly Echeverria

Motion: Non Navigable. Vote: All aye.

7. DISCUSSION AND ACTION REGARDING THE NAVIGABILITY OF THE SMALL AND MINOR WATERCOURSES IN PINAL COUNTY.

Motion by: Dolly Echeverria Second by: Cecil Miller

Motion: Non Navigable. Vote: All aye.

Jay Brashear: Something I have noticed regarding small and minor watercourses is that to call these small and minor watercourses, watercourses at all, is a stretch and perhaps the flood control people use a better term when they call them floodways.

8. DISCUSSION AND ACTION REGARDING EXECUTIVE DIRECTOR SALARY.

Discussion without action. Matter tabled to future meeting.

9. DISCUSSION AND ACTION REGARDING ATTORNEY HOURLY RATE.

Discussion without action. Matter tabled to future meeting.

10. CALL FOR PUBLIC COMMENT (comment sheets).

(Pursuant to Attorney General Opinion No. 199-006 [R99-002]. Public Comment: Consideration and discussion of comments and complaints from the public. Those wishing to address the Commission need not

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request permission in advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.)

11. **FUTURE AGENDA ITEMS AND ESTABLISHMENT OF FUTURE HEARINGS AND OTHER MEETINGS.**

Curtis Jennings: Indicated that he hopes all of the work and hearings can be done for all of the small and minor watercourses and all of the major rivers regarding which there is no controversy concerning navigability. He further indicated that there may be additional time necessary to complete the Commission's work regarding such watercourses as the Salt River, the Verde River the Gila River, and the San Pedro River because of its uniqueness.

Laurie Hachtel representing the State Land Department expressed concerns regarding the Land Department's ability to provide updates for 22 hearings scheduled during the year on the current ANSAC timeline. She said the Land Department will continue to do the best it can regarding updating reports and providing expert testimony. The Chair suggested that Ms. Hachtel let us know if they face problems so that we consider making some adjustments in our schedule. Discussed Gila County meeting dates.

12. **ADJOURNMENT.**

Motion by: Cecil Miller Second by: Dolly Echeverria

Motion: To adjourn. Vote: All aye.

Meeting adjourned at approximately 10:52 a.m.

Respectfully submitted,



George Mehnert, Director
September 17, 2004